ANTI-TRAFFICKING LAW AS A KEY TO GLOBAL ECONOMIC CONTRADICTIONS: A RESPONSE TO JANIE CHUANG

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Anti-trafficking law, with its rapid ascent to public visibility since the establishment of the Palermo Protocol fifteen years ago, offers a highly salient framework for understanding, and addressing, human exploitation. Yet this framework, as Professor Janie Chuang brilliantly illustrates in her article, Exploitation Creep and the Unmaking of Human Trafficking Law,[1] has proven both over-inclusive and, simultaneously and problematically, under-inclusive in its endeavors.

The anti-trafficking framework is broad enough to have overlapped substantially with potentially competing legal and institutional regimes through the "exploitation creep" that Chuang identifies—regimes that ban, respectively, forced labor ("Creep 1") and slavery ("Creep 2"). If brought to fruition, Chuang's exposition suggests, the effect of anti-trafficking's exploitation creep may be to marginalize the positive international law of forced labor and slavery treaties, and perhaps even to render them entirely superfluous.

In elucidating these shortcomings, Chuang combines astute doctrinal analysis with superb institutional commentary. The article's sharply drawn portraits of the turf battles between the International Labour Organization and the United States State Department, as a consequence of "Creep 1," make for fantastically informative reading. In assessing "Creep 2," Chuang's insights into the interaction of well-funded civil society groups and campaigns, with states and international organizations say something powerful about how decisions of international import are taken in a world of disaggregated and nongovernmental actors.

For all its capaciousness at the level of substance, however, the anti-trafficking framework severely contracts when it comes to legal remedy. As Chuang points out, anti-trafficking operates as an instrumentality of criminal law. As such, the harms arising from trafficking are explicitly attributed to the wrongdoing of individual bad actors, to be punished through criminal trials and punishments. This lens obscures and "normalizes" dynamics that shape both conditions of vulnerability of the exploited, and relative ease of action of the exploiters.[2]

Chuang's analysis forms an excellent example of what I've elsewhere described as "legitimation critique," arguing that anti-trafficking directs attention away from structural factors.[3] It is this structural mode of analysis to which I want to devote the rest of my comment. First, I will situate each of the other commentators and myself as allies in our emphasis on the importance of structural context as a basis for assessing anti-trafficking law—an emphasis that we, in turn, share with Chuang's excellent exposition in *Exploitation Creep*. Second, I will

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[1] Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AJIL 609 (2015).

[2] *Id.* at 611-612.

[3] Janet Halley et al., *From the International to the Local in Feminist Legal Responses: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 336, 388-392 (2006) (section by Chantal Thomas) (describing the "distributional consequences" of anti-trafficking law as the enforcement of sovereigntist border control agendas, the legitimation of exploitive work conditions not deemed to be trafficking, and the exacerbation of vulnerability of populations subject to trafficking through the perverse effects of criminalization).

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return to one structural element of which I believe anti-trafficking law to be particularly illustrative, which is the dual operation of the global economy in legal and illegal markets.

Exploitation Creep represents the latest accomplishment in an extraordinary body of work that Chuang has built up over fifteen years of scholarship. Many of the themes—the ideological subtext of a number of the definitional and enforcement issues, the context within geopolitics and foreign affairs, the complicated terrain populated by nonstate actors and international organizations as well as states—have been explored to productive effect in prior articles,[4] but *Exploitation Creep* brings these themes into conversation with each other and also situates them in a multilayered critique of bracing clarity. Chuang's voice is informed by her practical experience as well as scholarly perspective, and this well-rounded perspective is reflected in Chuang's vital contributions to the creation of a community of scholars and practitioners who share concerns related to the potential excesses of anti-trafficking law. Such efforts have included the co-creation of a website, the Interdisciplinary Project on Human Trafficking (of which I am a participant).[5]

All of these efforts share a skepticism about the anti-trafficking regime's tendency to focus on individualistic, criminal law solutions rather than attending to the larger structural harms generated by markets in their current configuration. The other commentators to this *AJIL Unbound* series—Aziza Ahmed, Karen Bravo, and Clifford Bob—and I share this approach as well, though our emphases fall on different aspects. Professor Bob's discussion of framing, for example, focuses on the discursive dimensions of structure. As Bob points out, the choice of legal framework affects the analysis and the remedy.[6] If you've got a hammer, every problem looks like it needs a nail; and if you've got an ascendant criminal law regime, every problem looks like it needs criminal prosecution. Other lenses are possible: Chuang supports a "labor approach" that would look to improve the protections of labor regulation and to better enforce those protections. Labor law enforcement can, of course, include criminal prosecution for labor law violations. But the labor approach permits a broader range of solutions, directed at least in part towards improving the bargaining power of workers *before* they become subject to criminal exploitation, not just punishing exploitation of them *ex post facto*.

In addition to labor law, a structural reassessment of trafficking should take immigration law into account. This is a dimension that Professor Bravo points out in her comment, observing that trafficking takes place against a backdrop of immigration controls that create conditions in which migrants contract with smugglers and traffickers.[7] Here, as well, I concur, and indeed have argued, that "immigration controls are the single most important distinctive, formal, legal characteristic contributing to conditions of 'modern-day slavery.'"[8] Of course, the "labor approach" and the "immigration approach" overlap in respects that are important to the question of workers' vulnerability to exploitation. For example, the dependence of temporary guest workers on employer sponsorship undercuts their ability to resist exploitive treatment. The employer sponsorship issue can be understood properly as one of immigration law since it arises out of visa regulations. There is a kind of

[4] *See, e.g.*, Janie Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J. L. & GENDER 269 (2013); Janie Chuang, *Article 6*, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Marsha Freeman et al. eds., 2012); Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010); Janie Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627 (2010); Janie Chuang, *The United States as Global Sheriff: Unilateral Sanctions and Human Trafficking*, 27 MICH. J. INTL. L. 437 (2006); Janie Chuang, *Beyond a Snapshot: Human Trafficking and the Politics of Labor Migration in a Globalized Economy*, 13 IND. J. GLOBAL LEG. STUD. 137 (Winter 2006); Janie Chuang, *Reconceptualizing Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RIGHTS J. 65 (1998).

[5] Interdisciplinary Project on Human Trafficking.

[6] Clifford Bob, *Re-Framing Exploitation Creep to Fight Human Trafficking: A Response to Professor Janie Chuang*, 108 AJIL UNBOUND 264 (2015).

[7] Karen Bravo, *A Crossroads in the Fight Against Human Trafficking?: A Response to Professor Janie Chuang*, 108 AJIL UNBOUND 272 (2015).

[8] Chantal Thomas, *Immigration Controls and Modern-Day Slavery* 9 (2013).

intersectionality at work here: it is often not just workers' vulnerability as workers, but as *migrant* workers, that renders them susceptible to trafficking.

The implications of this observation, are not only structural in their nature, but go to the very bedrock of modern societies that are organized by rules of territorial sovereignty. As such it is not surprising that sovereign states' prerogative over border control "'was never seriously questioned' during the drafting process that led to the United Nations Protocol Against Trafficking in Persons."[9] Instead, and by contrast, the anti-trafficking process largely reinforces borders. The UN Protocol requires states to accept repatriation of trafficked persons but establishes no corresponding obligation for relief as regards immigration status. At the national level, the immigration relief provided by the United States federal statute leaves much to be desired: only a fraction of the available visas are granted and the conditions for these visas arguably exacerbate the vulnerability of trafficking victims.[10]

Anti-trafficking advocates who campaign against "modern-day slavery," then, might be well placed to characterize themselves not as abolitionists of slavery, which has already been abolished, but as abolitionists of borders, or at least of the harsh border controls that help to exacerbate the vulnerability of cross-border trafficking victims. Rather than mounting a charge so radically challenging to the *status quo* of international law and foreign policy, with its increased focus on border security, anti-trafficking efforts have often proved adept at situating their concerns within that *status quo*. The history of the anti-trafficking movement is one of exceptional savviness in advocacy, from framing the issue, to identifying institutional contexts and alliances that maximize effectiveness. The question then becomes, what price was paid for this success. What more deep-rooted reform projects may have been discarded in exchange for a seat at tables of power?

It is this structural accommodation that Professor Ahmed critiques in her comment, outlining the ways in which anti-trafficking law formed one focal point for a "carceral 'modern-day slavery' (MDS) feminist project" that "travelled with a larger set of neoliberal prescriptions for development and broader efforts to address violence against women."[11] Here, too, I concur: in my own work-in-progress on "governance feminism in the global political economy," I tell a story in which feminist concerns become "mainstreamed" into development policy at the same time that foundational conceptual battles were being waged between "liberal feminists" and "dominance feminists."[12] The latter articulated a radical, structural critique of patriarchy as a pervasive exercise of violence against women—but, in the course of "gender mainstreaming," this broadly substantive understanding of violence against women became reframed: "In looking at how development institutions underst[oo]d the programmatic requirements that flow from [gender mainstreaming] commitments, one sees that the treatment of the issue of violence against women [was] reconciled with a larger, more or less liberal project."[13]

This comment? returns to the concept of "governance feminism" articulated in my? earlier critique of anti-trafficking law, and in doing so revisits a larger question of the accountability and effects of policy successes won by contemporary social movements, such as feminism or "modern day slavery" abolitionism. The variety of structurally oriented critiques articulated by Chuang's *Exploitation Creep*, and the commentators in this *AJIL Unbound* series, suggest that too much is sacrificed for policy salience. The social problem that motivates the movement gets reframed in a way far less challenging to established power, and the solutions that are fashioned

[9] Anne Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground?* 49 VA. J. INT'L L. 789, 790 (2009), quoted in Thomas, *supra* note 8, at 8.

[10] Halley et al., *supra* note 3, at 388-389 (describing limitations of the UN and U.S. provisions for relief and support of trafficking victims).

[11] Aziza Ahmed, *Exploitation Creep in Development: A Response to Professor Janie Chuang*, 108 AJIL Unbound 268 (2015).

[12] Chantal Thomas, *Governance Feminism in the Global Political Economy* (manuscript on file with author).

[13] *Id.* at 44.

as a consequence do far less to solve the problem and may even in some cases exacerbate it. Observation of this phenomenon leads to a second-level framing problem: do such limitations cancel out the purported gains of reform, or can they be seen as worthwhile in a longer-term setting, one in which the door has been opened towards building legal and political capacity for deeper reform?

Chuang alludes to this ambivalent meaning in the introduction and conclusion to *Exploitation Creep*. The road ahead is unclear: it might continue with more of the same, limited and even counter-productive, accommodations of anti-trafficking law and policy; or it might branch outward to a more meaningful set of responses. Optimists point to the increasing willingness of anti-trafficking enforcement to focus on "labor trafficking" in addition to "sex trafficking," whereas skeptics emphasize the relentless incorporation of anti-trafficking into "neoliberal penality."[14]

The role that anti-trafficking law and policy plays as part of a larger turn to "penality" or criminalization forms the basis for my concluding set of observations on structural context. Anti-trafficking law illustrates and exemplifies key contradictions that arise out of the phenomenon of illegal markets in an age of globalization. The global political economy includes not only legal markets for trade and labor, but also illegal and criminal markets that are created (that is, criminalized) and policed through various forms of governance. At the same time that international economic law and policy have adopted a posture of liberalization, an "international law of prohibitionism" has emerged to regulate the illicit transactions that, as much as the licit ones, form part of the expanding globalized economy. In my work on illegal markets,[15] I argue the following propositions related to the operation of global criminal markets as a terrain constructed by law:

First, as an empirical matter, legal and illegal markets are interconnected aspects of globalization. The rise of illegal markets—trade in illegal or illicit products and services, such as drugs and labor—parallels the growth in legal trade. Physically, technologies have lowered transaction costs in communication and transportation in illegal as well as legal trade; and transport vessels of legal trade have created smuggling opportunities for illegal trade. More complexly, legal rules configuring elements of the global order have contributed to these conditions, in their construction of both legal and illegal markets.

Most directly, the massive turn to criminalization and criminal law enforcement as a medium of policing illicit transactions, supported by international, regional, and local law and policy reforms, have perversely augmented both the incentives and the harms of illegal trade. Other legal effects have been indirect but significant: for example, instruments of trade and investment law have generated enabling and disabling/dislocating effects in local economies that have funneled resources into illegal markets. In sum, the growth of illegal markets in parallel with legal ones is not incidental but deeply interconnected.

Second, this empirical interconnection of legal and illegal markets is reflected in the discursive opposition of liberalization (the championing of free markets in trade and investment, and the explosion of international agreements to achieve that effect) and criminalization (the similarly pronounced ramping up of criminal law enforcement directed towards illicit trade). The latter represents what I call an "international law of prohibitionism." And at the same time that international economic law and policy have adopted a posture of liberalism and liberalization, an "international law of prohibitionism," taking the form of policing and criminalizing across borders, has emerged to regulate the illicit transactions that, as much as the licit ones, are forming a part of globalization.

[14] BERNARD HARCOURT, THE ILLUSION OF FREE MARKETS (2011).

[15] Chantal Thomas, *Disciplining Globalization: Law, Illegal Trade, and the Case of Narcotics*, 24 MICH. J. INT'L L. 549 (2003); Halley et al., *supra* note 3; Chantal Thomas, *Effects of Globalization in Mexico, 1980-2000: Labour Migration as an Unintended Consequence*, *in* SOCIAL REGIONALISM IN THE GLOBAL ECONOMY (Adelle Blackett & Christian Lévesque eds., 2010); Chantal Thomas, *Undocumented Migrant Workers in a Fragmented International Order*, 25 MD. J. INT'L L. 187 (2010).

Moreover, within this discursive frame, a juxtaposition of "normal" against "abnormal" markets, informed by clusters of economic, social, and historical phenomena, mediates the tension between market liberalization, on the one hand, and market prohibitionism, on the other, and allows a global economic regime that is self-consciously liberal to be accompanied by regulatory responses of a prohibitionist and criminalizing quality.

Finally, and moving to the predictive: Whatever the moralistic or misguided features of prohibitionism, its rise may also prefigure a transition to broader market regulation. Prohibitionism is the mirror image, and continuation, of the vast apparatus necessary to maintain a market-oriented regulatory posture, but it provides a vocabulary—albeit one shaped by constructs of "extraordinary" cases—that enables discussion of market controls in an ideological environment in which such discussion might otherwise be discouraged.

This perspective is informed by the modern history of governance: we can tell a story in which the rise of the welfare state finds its origins in the establishment of police power. At the turn of the twentieth century, moral panics about "white slavery" led to the establishment of treaties that formed the precursor to the Palermo Protocol. In the United States context, the same movement established the Mann Act, a federal statute that was among the first forms of robust interstate regulation, monitored by a burgeoning federal police power in the form of the newly created Federal Bureau of Investigation.[16] Eventually, however, moralistic or paternalistic concern over the protection of women formed the beginnings of the political will necessary to support broader economic regulation: consider that, in United States constitutional jurisprudence, the *West Coast Hotel* case that ended the *Lochner* era addressed the social need to protect women in the workplace.[17]

If all this is true, then prohibitionism may signal a willingness to change from the view that market regulation must be exceptional, to an understanding of the pervasiveness of market failures and the importance of regulation to protect against their excesses. In this context, the critique of anti-trafficking law should identify its structural limitations, but also its internal contingencies—and, perhaps, possibilities.

[16] Chantal Thomas, *International Law Against Sex Trafficking, in Perspective* 23.

[17] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage law for women).